IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

KENNETH M. FISHER, et al, Plaintiffs, vs. STATE OF WASHINGTON, DEPT. OF TRANSPORTATION, Defendant.	No. 11-2-21568-7 SEA MEMORANDUM OPINION

This matter is before this Court on cross-motions for summary judgment brought by plaintiff homeowners and defendant Washington State Department of Transportation ("WSDOT"). The general background and context of this action is not significantly in dispute. Plaintiffs are homeowners who live in a subdivision situated around Fairweather Basin in the Town of Hunts Point. WSDOT is constructing improvements to Highway 520 on subdivision property purchased from former homeowners of the subdivision. Plaintiffs maintain that the improvements are in violation of the restrictive covenants and have brought this action for inverse condemnation against WSDOT.

Inverse condemnation is "the popular description of an action brought against a governmental entity having the power of eminent domain to recover the value of property which

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has been appropriated in fact, but with no formal exercise of the power." *Martin v. Port of Seattle*, 64 Wn.2d 309, 310 n.1, 391 P.2d 540 (1964), cert. denied, 379 U.S. 989 (1965). An inverse condemnation case requires a party to establish: (1) a taking or damaging, (2) of private property, (3) for public use, (4) without just compensation being paid, (5) by a governmental entity that has not instituted formal proceedings." *Fitzpatrick v. Okanogan County*, 169 Wn.2d 598, 605–06, 238 P.3d 1129 (2010). The party asserting inverse condemnation holds the burden of proving that inverse condemnation occurred. *Pierce v. Ne. Lake Wash. Sewer & Water Dist.*, 123 Wn.2d 550, 556, 870 P.2d 305 (1994).

The issues before this Court are: 1) whether restrictive covenants are compensable private property rights when taken or eliminated by the State on adjoining properties, and, if so, (2) whether WSDOT's construction and structures on Lots 11 and 12 in Fairweather Basin violate the restrictive covenants.

Fairweather Basin was platted in 1957 in the Town of Hunts Point, Washington. It is a subdivision composed of 20 properties, with high-end, multimillion dollar homes surrounding a private yacht basin. Restrictive covenants govern the usage of property within Fairweather Basin. The 1994 Covenants plaintiffs contend are relevant to this action provide:

a.) **Residential Use:** "All lots in the plat shall be known and described as residential lots . . . No structure shall be erected, altered or placed or permitted to remain on any residential building plot other than one detached single-family dwelling for one single-family occupancy and a private, street side attached or detached garage and/or port."

b.) **Construction:** Construction must be completed within 12 months.

c.) **Waste:** No lot should be used as a dumping ground for waste.

d.) **Height of Walls:** No "boundary wall" can be higher than four feet.

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e.) **Location of Structures:** Lots 11 and 12 cannot construct any structure (exclusive of fences) within a radius distance of 130 feet from the center of the basin.

f.) **Rights on Turning Basin:** No retaining walls or bulkheads can be constructed within 80 feet from the center of the turning basin and while there may be excavations for mooring basins inside the high water line, there can be no sloughing or disturbance of any high water line and no disturbing or interfering with the use of any adjoining property owner..

g.) **Assessments:** Ownership of lots is accompanied by the responsibility to pay assessments levied by the Fairweather Basin Boat Club for maintenance of the channel and turning basin.

h.) **General Purpose:** The 1994 Covenants are restrictive mutual easements and covenants that (1) run with the land and (2) are binding on all owners.

Based upon this Court's review of the record, the parties' submission of briefing, and review of the applicable case law, the Court's sets forth its memorandum ruling.

1. **Restrictive covenants are protected property rights which are compensable when impaired**.

Washington Constitution Art. I, § 16, provides that "no private property shall be taken or damaged for private or public use without just compensation having first been made." Washington law further establishes that restrictive covenants constitute a property right. *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 128, 118 P.3d 322 (2005). The question of first impression in this state is whether State impingement on restrictive covenants on adjoining properties constitutes a taking which is compensable to the *neighboring homeowners* who are the beneficiaries of those mutual covenants. This Court finds persuasive the reasoning of the majority of courts from other jurisdictions which have addressed this issue.

As noted by the Supreme Court of California in *Southern Cal. Edison Co. v. Bourgerie*, 9 Cal.3d 169, 172 -173, (1973), a majority of jurisdictions which have considered the matter hold

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that building restrictions constitute property rights for purposes of eminent domain proceedings and that a condemner must compensate a landowner who is damaged by violation of the restriction. *See Horst v. Housing Auth. of County of Scotts Bluff* (1969) 184 Neb. 215 [166 N.W.2d 119, 121]; *Meredith v. Washoe County School District* (1968) 84 Nev. 15 [435 P.2d 750, 752-753]; *United States v. Certain Land in City of Augusta, Maine* (D.Me. 1963) 220 F.Supp. 696, 700-701; *School District No. 3 v. Country Club of Charleston* (1962) 241 S.C. 215 [127 S.E.2d 625, 627]; *Town of Stamford* v. *Vuono* (1928) 108 Conn. 359 [143 A. 245, 249]; *Allen v. City of Detroit* (1911) 167 Mich. 464 [133 N.W. 317, 320]; see cases collected in 4 A.L.R.3d 1137; 2 Nichols on Eminent Domain (3d ed. 1970) § 5.73[1].) The Restatement of Property also adopts this view. (Rest., Property, § 566.) *Friesen* and other cases adhering to the minority view have been sharply criticized by law review commentators. (See, e.g., Aigler, *Measure of Compensation for Extinguishment of Easement by Condemnation*, 1945 Wis.L.Rev. 5; Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another* (1970) 56 Iowa L.Rev. 293; Spies & McCoid, *Recovery of Consequential Damages in Eminent Domain* (1962) 48 Va.L.Rev. 437; Comment (1955) 53 Mich.L.Rev. 451.)

In *Leigh v. Village of Los Lunas*, 137 N.M. 119, 124 (N.M. Ct. App. 2004), a case factually analogous to the case at bar, the New Mexico Court of Appeals addressed whether restrictive covenants restricting use to residential purposes were considered property for purposes of eminent domain. Specifically, the appellate court considered whether the government was required to compensate owners of Tract 2 in a subdivision, based on the government's construction of a drainage pond on Tract 1 in violation of the restrictive covenants imposed on both properties. *Id.* at 121. The court explained that when the government took Tract 1 for public use, "it also took the Leighs' property interest in enforcing the restrictive covenants

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as to that tract. The Leighs' interest was not merely damaged; it was extinguished. Indeed, the jury was instructed that any damage award would result from the Leighs' 'inability to enforce their restrictive covenants.' Because the Leighs completely lost their property interest in Tract 1, we conclude that the Village took the Leighs' interest." *Id.* at 125.

This Court declines to adopt the reasoning set forth by courts in a minority of jurisdictions that restrictive covenants (or negative easements) constitute contract rights rather than property rights. In *Arkansas State Highway Commission v. McNeill*, 381 S.W.2d 424, 427(1964), the Arkansas Supreme Court noted that there is no basis upon which to differentiate the impact of a project on homeowners subject to restrictive covenants from those who are not:

> It seems almost too plain for argument that the reduction in the value of the McNeills' property is attributable not to the breach of the restriction but rather to the fact that a highway is about to pass through a residential district. Suppose, for example, that this addition, Crestview Estates, had been developed in exactly the same way that it was actually developed, as a residential district, but without any such restriction in the bill of assurances. If the interchange had then been constructed the McNeills' damage, as far as the pleadings and proof indicate, would have been the same to the penny as if the restriction had existed. Yet it would not have been compensable. Thus it is illogical to permit a recovery upon the theory that the breach of covenant is the proximate cause of the injury.

However, this reasoning is inconsistent with the recognition by our courts that "private land use restrictions 'have been particularly important in the twentieth century when the value of property often depends in large measure upon maintaining the character of the neighborhood in which it is situated.' " *Riss* , 131 Wash.2d at 623, citing *Joslin v. Pine River Dev. Corp.,* 116 N.H. 814, 367 A.2d 599, 601 (1976). What the minority view fails to recognize is the inherent increase in value in property as a consequence of the restrictive covenant itself. "Such covenants are entered into by the grantees for their mutual protection and benefit, and the consideration therefor lies in the fact that the diminution in the value of a lot burdened with restrictions is partly or wholly offset

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by the enhancement in its value due to similar restrictions upon all the other lots in the same tract." *Tindolph v. Schoenfeld Bros.* 157 Wash. 605, 609-610, 289 P. 530, 532 (1930). This distinguishes the impact of a project on homeowners subject to restrictive covenants from those who are not. As part of their purchase of homes with restrictive covenants, plaintiffs here have purchased a valuable property right which has been impaired by WSDOT. As a consequence, they are entitled to just compensation.

As well articulated by the Michigan Supreme Court in *Terrien v. Zwit,* 648 N.W.2d 602 (Mich. 2002):

> "It is a fundamental principle, both with regard to our citizens' expectations and in our jurisprudence, that property holders are free to improve their property. We have said that property owners are free to attempt to enhance the value of their 'property in any lawful way, by physical improvement, psychological inducement, contract, or otherwise.' Covenants running with the land are legal instruments utilized to assist in that enhancement. A covenant is a contract created with the intention of enhancing the value of property, and, as such, it is a "valuable property right."

There should be little doubt that given Washington's recognition of restrictive covenant provisions as important and valuable property rights – *vis a` vis* other homeowners and grantors – that impairment or extinguishment of that property right should be compensable when done by the State.

2. <u>The WSDOT project violates certain of the restrictive covenants as a matter of law.</u>

The interpretation of a restrictive covenant is a question of law. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402 (2006). "The court's goal is to ascertain and give effect to those purposes intended by the covenants." *Riss v. Angel,* 131 Wash.2d 612, 623, 934 P.2d 669. In ascertaining this intent, the court must give a covenant's language its ordinary and common use and will not read a covenant so as to defeat its plain and obvious meaning. *Mains Farm Homeowners Ass'n v. Worthington,* 121 Wash.2d 810,815-16, 854 P.2d 1072 (1993).

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(Homeowners association brought action alleging that adult family home violated protective covenant that property would be used for single-family residential purposes only.) Moreover, "[t]he court will place 'special emphasis on arriving at an interpretation that protects the homeowners' collective interests.' " *Riss,* 131 Wash.2d at 623–24, 934 P.2d 669 (quoting *Lakes at Mercer Island Homeowners Ass'n v. Witrak,* 61 Wash.App. 177, 181, 810 P.2d 27 (1991)).

"Where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable." *Riss,* 131 Wash.2d at 623, 934 P.2d 669. This is because " '[s]ubdivision covenants tend to enhance, not inhibit, the efficient use of land.... In the subdivision context, the premise [that covenants prevent land from moving to its most efficient use] generally is not valid.' " *Id.* at 622, 934 P.2d 669 (emphasis omitted) (quoting *Mains Farm,* 121 Wash.2d at 816, 854 P.2d 1072).

Plaintiff homeowners have identified specific anticipated uses by WSDOT on Lots 11 and Lot 12 that will impair or extinguish the restrictive covenants. These include, but are not limited to, the following project elements: (1) a retaining wall and noise wall; (2) new stormwater management facilities; (3) new SR 520 regional pedestrian and bicycle path; (4) illumination (5) relocation of existing Points Loop trail; (6) 84th Interchange reconfiguration; (7) drainage conveyance; (8) signing; and (9) landscaping.

Preliminarily, WSDOT maintains that "[t]he plain language of the 'residential' covenant does not address "use" of the lots or specify how the lots may be *used.* The Fairweather covenants contain no restriction on the use of lots." This court disagrees. The restrictive covenant clearly and unambiguously states:

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> All lots in the plat shall be known and described as residential lots . . . No structure shall be erected, altered or placed or permitted to remain on any residential building plot other than one detached single-family dwelling for one single-family occupancy and a private, street side attached or detached garage and/or port."

As this Court must "place special emphasis on arriving at an interpretation that protects the homeowners' collective interests" *Riss,* 131 Wash.2d at 623–24, 934 P.2d 669, it can reach only one reasonable interpretation in interpreting this provision: structures that are constructed must be single family residences and appurtenances related to such structures, as identified through the covenants: boat houses, wharfs, mooring structures, bulkheads, pools, fences, pump houses, incinerators "or other equipment," and boundary walls. This Court concludes as a matter of law that a commercial detention pond and stormwater maintenance facilities are neither single family residences nor a swimming pool (as analogized by WSDOT, "From the standpoint of a non-adjoining lot owner with no right of access, the storm water retention pools planned by WSDOT must be deemed "similar" to swimming pools.".) As a consequence, construction of these structures violates the restrictive covenants of Fairweather Basin. To the extent that walls, retaining walls, or noise walls constructed by WSDOT exceed the height limitations of the restrictive covenants, they are in violation of the restrictive covenants.

With respect to plaintiffs' other claims that WSDOT's construction and activities violate the restrictive covenants, this Court finds genuine issues of material fact, to be determined by the trier of fact. These include, *inter alia:* structure (exclusive of fences)" within 130 feet of the center of the turning basin; sloughing or disturbance of high water line.; disturbing or interfering with the use of any adjoining property owners; and maintaining the utility, beauty, and general appearance of the waterway.

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3. Plaintiff homeowners have the burden of proving to the trier of fact damages resulting from the diminution in their property values.

WSDOT contends that there has been no taking. WSDOT argues that in order for there to have been a taking of a non-possessory interest such as the restrictive covenants involved in this case that plaintiffs must establish that WSDOT's acquisition of lots 11 and 12 or the construction of the project on that property have caused a substantial reduction in value of plaintiffs' residential property. However, based on the reasons stated above, the impingement or extinguishment of restrictive covenants may constitute a taking insofar as the fair market value of the property of adjacent landowners has been diminished. The proper calculation of damages for the taking of a restrictive covenant is the difference between the fair market value of the property benefitted by the covenant immediately before and immediately after the taking. *See Leigh v. Village of Los Lunas,* 137 N.M. 119, 124-125. ("[h]olders of the dominant estate are entitled to be compensated for the diminution in the value of their lots as a result of the extinguishment of the equitable servitude").

The purpose of a before and after valuation is to ensure that just compensation is provided for the diminution in value caused by the taking; the "before" value is calculated as if there were no taking, and the "after" value is calculated as if the taking had already occurred. *City of Albuquerque v. Westland Dev. Co.,* 121 N.M. 144, 148, 909 P.2d 25, 29 (Ct.App.1995). The before and after rule requires that a claimant prove a decline in the value of the claimant's land caused by the taking. *See id.; Town of Stamford v. Vuono,* 143 A. 245, 249 (Conn. 1928) (stating that the lot owner is entitled only to the actual depreciation in the value of her property resulting from the loss of the building restriction on adjacent property taken for public use). Consequently, as the *Bourgerie* court observed, the public use to which some condemned lots are

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put would likely injure only those landowners immediately adjoining or in close proximity to the lot taken; the public use of other condemned lots may result in only negligible damages to other lot owners, regardless of the distance from the condemned lot. *Bourgerie,* 107 Cal.Rptr. 76, 507 P.2d at 968 (remarking that a fire station may result in more damages than a public park, for example); *see also* Richard I. Brickman, *The Compensability of Restrictive Covenants in Eminent Domain,* 13 U. Fla. L.Rev. 147, 168 (1960) ("As the distance of the claimant's lot from the invaded tract increased, the amount of compensation would rapidly diminish soon to the vanishing point."

Accordingly, the State's objection that some homeowners may have suffered no damages goes to the issue of the measure of damages – to be decided by the trier of fact – and not to the issue of compensability.

4. **Conclusion and Order.**

Based upon the reasons set forth above, this Court orders as follows:

a. Plaintiff Homeowners' Motion for Partial Summary Judgment is GRANTED, as set forth above; and

b. Defendant Washington State Department of Transportation's Motion for Summary Judgment is DENIED; and

c. The issue of the amount of just compensation is reserved for determination by the jury at the scheduled trials.

DATED this 26th day of April, 2012.

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